RACIAL RESTRICTIONS IN COVENANTS IN DEEDS.

When placing racial restrictions, by way of covenant, or conditions subsequent, in conveyances of land, you deprive the grantee of the same right in property as is enjoyed by another citizen in respect to the land. You attach to his proprietorship some of the inhibitions against dominion, and such inhibitions are those only which were alone incident to a condition of slavery, which it was the design of the Congress to abolish along with slavery. The Federal Constitution, treaties and laws, form the supreme law of the land, and the question of the public policy of such restrictions is subordinated when the policy of the law has been declared in a statutory enactment. The latter must control.

Restrictions Other Than Racial.

Numerous varieties of restrictions other than racial, which have been made in grants of land, have been tested in the main by the rule of public policy.

The term "public policy" is equivalent to the policy of the law. It is applicable to the spirit as well as to the letter. (Billingsby *v.* Clelland, 41 W. Va. 244.)

As a general proposition, it has been said as to such restrictions where against alienation of an estate given to one in fee, that they are void as contrary to public policy (2 Tiffany Real Prop. 1135), but to which are exceptions. Thus, restrictions may be placed on the alienation of property granted, if they be reasonable, and it is held by the weight of authority that a condition that the grantee shall not alienate to a particular person, or for a specified time is reasonable and valid. (Camp *v.* Cleary, 76 Va. 143; Monroe *v.* Hall, 97 N. C. 206; Landon *v.* Ingram, 28 Ind. 360.) If there be nothing *malum in se,* or *malum prohibitum* stipulated for, it will not be against public policy, unless the advantage to the public from so holding is certain and substantial. (8 R. C. L. 1107.)

Racial Restrictions.

Racial restrictions contained in covenants, and in conditions subsequent in deeds, which we find in the few reported cases

are aimed against the sale to, or the use and occupancy of land by, other than the Caucasian race.

Where land was conveyed, "on express understanding and agreement that the lot of land so conveyed is never to be sold to, or occupied by negroes," the court construed the words as those of covenant and not condition. (Anthony *v.* Stephens, 46 Ga. 241.) For conditions subsequent are not favored in law, because they tend to destroy estates, and a party who insists upon a forfeiture for a breach of such condition must bring himself clearly within the condition. (Peoples Pleasure Park Co., Inc. *v.* Rohleder, 109 Va. 439.)

Where the deed provided that: "title to this land is never to vest in a person or persons of African descent," the court below decreed that it was "an unreasonable restraint on alienation, contrary to public policy, null and void," while the appellate court refrained from passing on its validity or invalidity as a racial restriction the position being taken, and the court holding that the covenant was not violated by a subsequent conveyance of the land to a corporation, the corporation not being a forbidden person, i. e., of African descent. (Peoples Pleasure Park Co. *v.* Rholeder, *supra.*)

But where the courts in the few reported cases thus far have passed upon the validity or invalidity of racial restrictions, they have been tested by the provisions of the XIV Amendment to the Federal Constitution, and the rule of public policy of the particular state. The XIII Amendment to the Federal Constitution and the Civil Rights Acts of Congress passed under its authority, which we conceive alone applicable, have never been applied in the reported cases we have been able to see. The courts in the two following cases held and were bound to hold, as has been held in the Civil Rights Cases, 109 U. S., p. 17, that the XIV Amendment did not apply to individuals in their private contracts.

Not Contrary to Public Policy.

A condition in a deed for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, is not against the public policy of the State. Queensborough Land Co. *v.* Cazaux, 136 La. 724.

"The discrimination against negroes has been recognized in other matters where their presence has been objected to for reasons similar to the reasons advanced here; for instance the law providing for separate coaches for those occupied by white persons has been held lawful and reasonable." (Koehler *v.* Rowland, 275 Mo. 585-6.) The discrimination in a right which the court had in mind, was a fundamental right in property, which was not passed on in Plessy *v.* Ferguson, 163 U. S. 537, and which authority the court cited.

In the statutory enactments in the States, we find extant, and nonexistent now in some States, that equal privileges in inns, railroads, schools and places of public resort were accorded the citizen, and were enforceable by criminal prosecution. These enactments were held constitutional, though the courts so holding were not called upon to pass on the question of fundamental rights in property. (Joseph *v.* Bidwell, 28 La. Ann. 382; McCrea *v.* Marsh, 71 Am. Dec. 749; People *v.* King, 6 Am. St 389.)

Contrary to Public Policy.

The California court after holding the covenant void as against public policy also said: "Conditions in a deed fee simple absolute against leasing or selling to negroes within a certain time, is within the common-law rule of which Civil Code sec. 711 is declaratory, that conditions restraining alienation when repugnant to the interest created, are void." (Title Guarantee & Inv. Co. *v.* Garott, 183 Pac. 479.) Yet the same court in a subsequent case said:

"A condition subsequent in a deed that the property should not be occupied by persons not of Caucasian birth, being not a restraint upon alienation, but upon the use of property, is valid." (Los Angeles Inv. Co. *v.* Gary, 186 Pac. 596.)

Property is more than the mere thing which a person owns. "It is elementary that it includes the right to acquire, use and dispose of it." (Holden *v.* Hardy, 169 U. S. 391; Buchanan *v.* Warley, 245 U. S. 78.)

A covenant in a deed not to convey or lease land to a Chinaman, is void as contrary to the public policy of the government,

in contravention of its treaty with China, and in violation of the XIV Amendment. (Grandolpo *v.* Hartman, 49 F. 181.) In the foregoing case the treaty with China was primarily involved in the decision. The XIV Amendment has no application to the acts of individuals unless under state authority; certainly not as to their private contracts.

XIII AMENDMENT AND CIVIL RIGHTS ACTS OF CONGRESS.

Just prior to the XIII Amendment, slavery as it then existed was the only manner of involuntary servitude, not inflicted as a punishment for crime.

A slave could not take property by descent, there being in him no inheritable blood. (Jackson *v.* Levroy, 5 Cowen 397.) He could not purchase or lease. His master could not even bring a suit on his executory contract. (Fable *v.* Brown, 2 Hill's Ch. 378.) He could not hold property as title vested in his master. (Fable *v.* Brown, *supra.*) He could not *sell* and *convey* it, unless he did so before his master took possession of it. (4 Co. Litt. Book II, Sec. 173.) However, the slave, while viewed merely as property, possessed various rights as a person and was treated as such by the law. (Neal *v.* Farmer, 9 Ga. 582.)

The XIII Amendment provided:

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. The Congress shall have power to enforce this article by appropriate legislation."

Congress enacted in 1866 among other provisions of the CIVIL RIGHTS ACTS:

"1. All citizens of the United States shall have the same right in every state and territory, as is enjoyed by *white* citizens thereof, to inherit, purchase, lease, sell, hold and convey property real and personal." (Rev. St. U. S. sec. 1878.)

When the XIV Amendment was afterwards proclaimed ratified, the foregoing clause, among others of the Civil Rights

Act, was re-enacted. Whenever in the Federal Courts, the power of Congress to enact such property right clause has been questioned in its relation to fundamental rights of property within the domain of the States, under the authority conferred in the XIII and also the XIV Amendment so to do, it has been uniformly upheld.

The States were not slave-holders, but the individuals in the States were. The XIII Amendment was directed against slavery and involuntary servitude except as a punishment for crime against the people, and as thus directed it was the purpose of Congress to further remove in the Civil Rights Acts, the fetters which prohibited civil rights in property real and personal.

"Under the XIII Amendment, the legislation so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the act of individuals, whether sanctioned by state legislation or not." (Civil Rights Cases, 109 U. S. 23, 35.)

"Congress has power under the XIII Amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of such right is solely because of race or color, and Sec. 1 of Civil Rights Act . . . is within such power." (U. S. *v.* Morris, 125 F. 322.)

The enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (Buchanan *v.* Warley, 245 U. S. 78.)

In the latter case the property right clause of the Civil Rights Act was applied to State laws under the prohibitions of the XIV Amendment alone, as such amendment applies solely to acts done under state authority.

A conspiracy between two or more persons to prevent negro citizens from exercising the right to lease and cultivate land, because they are negroes, is a conspiracy to deprive them of a right secured to them by the Constitution and laws of the United States. (U. S. *v.* Morris, 125 Fed. 322.)

There may be *dicta* seemingly opposed to the views of the

Courts in the cases just cited in support of our position, but when the following cases are carefully examined, it will be seen that rights of a civil nature, other than fundamental rights in property real were under consideration.

Thus it has been held: "The Federal Courts have no jurisdiction of an action for damages by a citizen of African descent against an Anglo-Saxon of the same State under the Civil Rights Acts; for an alleged unlawful assault under color of executive authority. The protection of the right to life, liberty and property is within the domain of the State." (Brawner *v.* Irvin, 169 F. 964.) Constitution of the United States Amendment XIII, relates only to slavery and involuntary servitude, and although it established universal freedom, it does not authorize Congress to legislate upon subjects which are within the domain of the State. (U. S. *v.* Washington, 20 F. 630.) An act of Congress directed exclusively against individuals, and not the States, is broader than the *amendments* (collectively), "and is without constitutional warrant." (Le Grand *v.* U. S., 12 F. 577.)

In matters of civil right other than fundamental rights as for instance, accommodation in conveyances, the XIII Amendment has not respect to distinctions of race or color (Plessy *v.* Ferguson, *supra*), but in Buchanan *v.* Warley, *supra,* known as the "segregation case," as to fundamental rights in property it was held that XIV Amendment and Civil Rights Acts had such respect.

In attaching racial restrictions in conveyances of land, you deny the grantee the same right in the State as is enjoyed by another citizen thereof to inherit, lease, sell, hold and convey real property.

It would be possible, if restrictive racial conditions were held to be valid, for the proprietor of land, white or colored, to bring about by them, the segregation of the races in their residences and other places as well. And not only that, it would thereby open up an opportunity to the more potential of the races to reduce the weaker to a new form of slavery.

Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the XIII Article, it forbids

any other kind of slavery now or hereafter. (Slaughter-house Cases, 16 Wal. 72.)

To place the grantee who has been conveyed the fee-simple title to land, with allodial dominion as to the State, under the power of the grantor, is to make the latter the master of the former as to the disposition and beneficial use of the land granted. Where the restrictions do not relate to race or color, they will be held invalid where the advantage to the public from so holding is certain and substantial; where they relate to race or color, they introduce a new form of bondage, which the Civil Rights Acts annul.

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